

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROBERT L. PAVONE and VALERIE V.
PAVONE,

Plaintiffs,

08 Civ.2389 (CLB/LMS)

-against-

LINDA PUGLISI, individually, ANN
LINDAU, individually, FRANCIS X.
FARRELL, individually, JOHN SLOAN,
individually, THOMAS WOOD,
individually and the TOWN OF
CORTLANDT, New York,

Defendants.

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**PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF CROSS MOTION TO
DISMISS QUALIFIED IMMUNITY MOTION
ON THE GROUNDS OF PRE-TRIAL WAIVER**

Preliminary Statement

This memorandum of law is submitted in support of Plaintiffs' motion to dismiss a qualified immunity motion made by the individually named Defendants since for purposes of pre-trial motion practice the qualified immunity defense has been waived.

The Indisputable Facts

On May 16, 2008, Judge Brieant issued a Scheduling Order annexed in this case (Exhibit 1 to Lovett Affirmation).

As provided for in paragraph 3(d) of that Order, for the individually sued Defendants to preserve an opportunity to make a pre-trial qualified immunity motion they were required to depose the Plaintiffs within thirty days of May 16, 2008, and within thirty days thereafter they were required to make a motion to dismiss and/or for judgment on the ground of qualified immunity (Exhibit 1).

The subject Defendants did not comply with Judge Brieant's Order. In that connection they did not, through no fault of the Plaintiffs, take the Plaintiffs or either of the Plaintiff's depositions within the initial thirty day period (Lovett Affirmation, para. 3).

They did, in disregard of the scheduling Order, then make a qualified immunity motion a copy of which is annexed as Exhibit 2 (Lovett Affirmation, para. 4).

POINT

SINCE ANY PRE-TRIAL MOTION ON A QUALIFIED
IMMUNITY DEFENSE HAS BEEN WAIVED, THE QUALIFIED
IMMUNITY MOTION MUST BE DISMISSED

As made exquisitely clear in the Scheduling Order
issued by Judge Brieant:

"Failure to comply with this provision [3(d)] of
this Order shall operate as a waiver of the
opportunity to resolve the issue of qualified
immunity prior to trial"

(boldface in original).

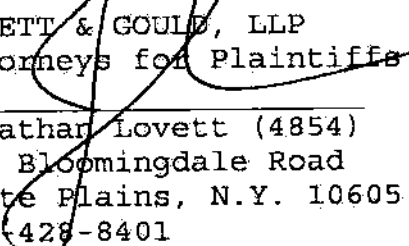
Since the individually named Defendants manifestly did
not comply with Section 3(d) of the Scheduling Order, they
have waived any pre-trial opportunity to move to dismiss the
complaint on the ground of qualified immunity.

Conclusion

An order should be entered dismissing the qualified
immunity motion on the ground that the pre-trial opportunity
to make that motion was waived by the individually named
Defendants by reason of their disregard of the terms of

Judge Brieant's scheduling order.

Dated: White Plains, N.Y.
July 30, 2008

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